

**23-7148**  
No:

**ORIGINAL**

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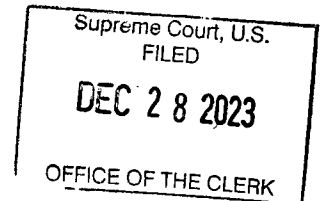
IN THE  
SUPREME COURT OF THE UNITED STATES

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**ARNOLD ANCRUM**  
Petitioner

Vs.

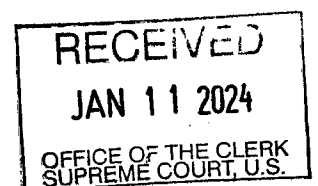
RESPONDENT(S)



**ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF  
APPEALS FOR ELEVENTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

**Arnold Ancrum DC#444523  
Okeechobee Correctional Insti.  
3420 N.E. 168<sup>th</sup> Street  
Okeechobee, Florida 34972**



**QUESTION(S) PRESENTED**

(1)

**WHETHER PETITIONER'S 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENT RIGHTS WERE VIOLATED UNDER THE FEDERAL MAGISTRATE ACT OF 1979, WHEN A REPORT AND RECOMMENDATION FROM THE MAGISTRATE JUDGE WAS NOT FILED DURING PETITIONER'S 2254 PROCEEDINGS**

(2)

**WHETHER PETITIONER'S 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENT RIGHTS WERE VIOLATED UNDER STRICKLAND BY TRIAL COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO SUBPOENA THE TESTIMONY OF THE CASE ATTEMPTED MURDER VICTIM WHO POSSESSED AND FIRED [A]NOTHER .22 WEAPON DURING THE CASE SHOOTING; WHICH TESTIMONY BY STATE WITNESSES SUGGEST WAS THE .22 WEAPON THAT FIRED THE FATAL SHOT**

(3)

**WHETHER PETITIONER'S 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENT WERE VIOLATED BY THE APPELLATE COURT, UNDER THE "INNOCENCE EXCEPTION TO THE PROCEDURAL DEFAULT" PETITIONER MADE A SUBSTANTIAL SHOWING TO PROCEED ON HIS "GATEWAY ACTUAL INNOCENCE" CLAIM SCHLUP WHERE AN "EYEWITNESS" AND "CRITICAL PHYSICAL EVIDENCE WAS NOT PRESENTED AT TRIAL"**

## LIST OF PARTIES

Allen Greensburg - Assistance Appellant Attorney Public Defender  
Angelica D. Zayas - Assistant Attorney General (State)  
Brian H. Zack - Assistance Attorney General (Federal)  
Bruce alter - Trial Attorney  
Charlene Sorrentino - Magistrate Judge  
Darrin P. Gayles - Federal District Judge  
Federicka Smith - Trial Judge  
Graham - Federal District Judge  
Rafael Rodriguez - Special Assistance Public Defender  
Keri T. Joseph - Assistant Attorney General  
Lisette Reid - Magistrate Judge  
Lora Sefe - Trial State Attorney  
Maria Guardia - Public Defender for resentencing  
Maria Verde - Resentencing Judge

## RELATED CASES

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

Opinions below

Case from federal court:

District Court Case No: 1:20-CV-21363-Gayles

Appellate Court Case No: 21-014312-F

Case from the state court

Case No: 96-2597

Case No: 3D18-2249

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## JURISDICTION

### Federal courts

1. Petitioner filed his amended 2254 petition on 6-3-2020.
2. The district court denied petition on 11-8-2021.
3. The district court denied petitioner's request for COA
4. Petitioner filed Notice of Appeal and Request for COA on 2-28-2022
5. The Eleventh Circuit dismissed petitioner's case on 3-02-202.
6. Not knowing his case was dismissed, petitioner filed an inquiry on and the clerk notified petitioner to file Motion to Reinstatement, which petitioner file on 11-18-2022.
7. After satisfying appellate court procedures, Petitioner filed for Reinstatement on 3-3-2023.
8. The Eleventh Circuit GRANTED petitioner's Motion for Reinstatement but denied Petitioner's Request for COA on 9-30-2023.
9. A Motion for Reconsider a was filed on 7-27-2023
10. No motion for hearing was filed.

### State court

1. On February 3, 2014, petitioner filed a 3.800(a) motion to correction illegal sentence. On October 29, 2014, the postconviction court vacated the sentencing orders for count 2, 3, and 4 and imposed a new sentence.
2. October 22, 2014, petitioner also filed a petition for writ of habeas corpus with the post-conviction court arguing four (4) claims.
3. On February 4, 2015, the postconviction court denied petitioner's petition.
4. On February 28, 2015, Petitioner appealed
5. On May 1, 2017, the Third District denied petitioner's appeal.
6. On August 14, 2017, a mandate was issued.
7. On August 24, 2017, petitioner filed a notice to invoke discretionary jurisdiction in the Florida Supreme Court.
8. On November 27 2017, petitioner filed a petition for writ of habeas corpus raising six claims.

9. On September 12, 2018 the trial court denying and dismissed in part petitioner's writ.
10. On September 26, 2018 petitioner filed a Motion for Rehearing.
11. On October 25, Rehearing was denied.
12. On November 5, petitioner filed a Notice of Appeal.
13. On July 17, 2019, the Third District Court of Appeals affirmed.
14. On August 2, 2019, petitioner filed Motion for Rehearing.
15. On August 28, 2019, Rehearing was denied.
16. On September 13, 2019 a Mandate was issued.
17. On September 24, 2019, petitioner filed Notice to Invoke Jurisdiction in the Florida Supreme Court.
18. On November 25, 2019, the Florida Supreme Court denied jurisdiction.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **STATUTORY PROVISIONS**

Title 28 U.S.C. § 636(b)(1)&(c)

This magistrate judge shall file a proposed finding and recommendation under subparagraph (b) with the district court and a copy shall forthwith be mailed to all parties.

Within fourteen (14) days after being served with a copy; any party may serve and file written objections to such proposed finding and recommendations as provided by Fed.R.Civ.P. A judge of the court shall make a defendant novo determination of those portions of the report or specified proposed finding or recommendation to which the objection was made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendation made by the magistrate judge.

Herein, the district court failed to allow the magistrate judge assigned to Petitioner Ancrum's case to make a report and recommendation. Petitioner Ancrum was denied an opportunity to file an Objection within fourteen (14) days. Petitioner Ancrum was thereby deprived of pointing out those points of facts to the district court in which the objection was made.

### **CONSTITUTIONAL PROVISIONS**

6<sup>th</sup> Amendment

14<sup>th</sup> No person shall be deprived of due process and equal protection of the law.

## **STATEMENT OF THE CASE**

On December 30 1989, petitioner and co-defendants engaged an armed robbery on two individuals. As petitioner approached Harrison, Miller opened fire on petitioner. Both Harrison and Petitioner fell to the ground to escape Miller's gun fire. Miller was then struck by petitioner's co-defendant. Harrison was struck by a single bullet and died. Miller was treated for a single gunshot wound and released from the hospital that night.

Days later, petitioner and co-defendants were arrested and charged with murder, attempted murder, armed robbery, conspiracy to commit armed robbery and possession of a firearm while in commission of a felony.

Petitioner and co-defendants were tried jointly. During petitioner's trial, it was determined the deceased was fatally wounded by a .22 bullet. Petitioner and victim Miller possessed .22 caliber weapons' during the case shooting. At petitioner's trial, 23 witnesses testified for the state, but none testified to who fired the fatal shot that killed the deceased. Homicide Detective Rex Remley testified that victim Miller disclosed that he possessed, fired and possibly shot somebody on the night of the crime. On 6/14/1990, Miller disclosed in his deposition that he possessed and fired a .22 type weapon. Detective Ray freeman testified that the spent .22 projectile he examined did not "conclusively" match to petitioner's .22 firearm and "could have been" fired from another .22 caliber weapon. Miller never testified during petitioner's trial. The State chose not to call Miller to testify. Defense counsel failed to subpoena Miller's testimony. The jurors never heard or evaluated Miller's testimony or facts surrounding his .22 type weapon.

The jurors ultimately found petitioner guilty of all charges, including first degree murder.

Petitioner appealed the conviction and sentence to the Third District Court of Appeal but the appeal. Clarrington v. State, 636 So.2d 861 (Fla. 3<sup>rd</sup> DCA 1994). The appellate court dismissed count five, but affirmed the remaining sentences and conviction. Petitioner filed a timely 3.850 motion under Florida Rules of Criminal Procedure in the trial court. One of the six claims are presented in this Certiorari. (Issues one and four). The trial court summarily denied petitioner's motion and the District Court affirmed. See Ancrum v. State, 681 So.2d 287 (Fla. 3<sup>rd</sup> DCA 1996).

Petitioner then filed a timely a Habeas Corpus (2245) in the Federal District Court for the Southern District of Florida. The District Court adopted the Magistrate's Judge Report and Recommendation and denied petitioner's petition and failed issue a COA. Petitioner filed a timely Notice of Appeal in the District Court seeking a COA which the court again denied. Petitioner requested the appellate court to issue a COA, which the court denied as well. Petitioner Rehearing was also denied. Last petitioner sought Certiorari review in the United States Supreme Court, but the court denied discretionary review.

Petitioner then filed a 3.800(a) Motion to Correct Illegal Sentence in the 11<sup>th</sup> Judicial Circuit, Miami-Dade County, Florida. The court granted the motion and petitioner was resentenced on counts two, three and four. Petitioner's 1 year of federal time was tolled; constituting a new judgment. See Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788 (2010).

Petitioner filed Habeas Corpus consisting of four issues. Magistrate Judge Lissette Reid was assigned. As show cause was issued and a Reply was filed. The District Court denied petitioner's petition.

Under the Federal Magistrate Act of 1979, petitioner's constitutional rights were violated under the 6<sup>th</sup> and 14<sup>th</sup> Amendment. Brown v. U.S., 748 F.3d 1045, 1056 (11<sup>th</sup> Cir. 2014). Pursuant to the Act, the magistrate judge has a constitutional duty to issue a Report and Recommendation. Thomas v. Arn, U.S. 140-149, 106 S.Ct. 466 (1985).

Also See Fed.R.Civ.P., Rule 72(b)(1)(2), dispositive motion and prisoners petitions and 28 U.S.C. § 636(b)(1)(A)(B) & (C). See Roell v. Withrow, 538 U.S. 580, 123 S.Ct. 1693, 1703 (2003). Petitioner was denied procedural Due Process and Equal Protection of the Law. See McCarthy v. Bronso, 111 S.Ct. 1737 (1991) and Brown v. U.S., 748 F.3d 1045, 1056 (11<sup>th</sup> Cir. 2014).

## **REASONS FOR GRANTING THE WRIT**

In the interest of protecting petitioner's 6<sup>th</sup> and 14<sup>th</sup> Amendment Constitutional rights, under due process clause and equal protection of the law were violated, the writ should be granted, pursuant to the Federal Magistrate Act of 1979 and Fed.R.Civ.P., Rule 72(b)(1)(2), dispositive motion and prisoners petitions and 28 U.S.C. § 636(b)(1)(A)(B) & (C).

The Eleventh Circuit Court of Appeal failed to issue a COA to address this constitutional issue:

### **(1)**

#### **WHETHER PETITIONER'S 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENT RIGHTS WERE VIOLATED UNDER THE FEDERAL MAGISTRATE ACT OF 1979, WHEN A REPORT AND RECOMMENDATION FROM THE MAGISTRATE JUDGE WAS NOT FILED DURING PETITIONER'S 2254 PROCEEDING**

Under the Federal Magistrate Act of 1979, petitioner's constitutional rights were violated under the 6<sup>th</sup> and 14<sup>th</sup> Amendment. Brown v. U.S., 748 F.3d 1045, 1056 (11<sup>th</sup> Cir. 2014). Pursuant to the Act, the magistrate judge has a constitutional duty to issue a Report and Recommendation. Thomas v. Arn, U.S. 140-149, 106 S.Ct. 466 (1985). See Also Fed.R.Civ.P., Rule 72(b)(1)(2), dispositive motion and prisoners petitions and 28 U.S.C. § 636(b)(1)(A)(B) & (C). See Roell v. Withrow, 538 U.S. 580, 123 S.Ct. 1693, 1703 (2003). Petitioner was denied procedural Due Process and Equal Protection of the law. See McCarthy v. Bronso, 111 S.Ct. 1737 (1991) and Brown v. U.S., 748 F.3d 1045, 1056 (11<sup>th</sup> Cir. 2014).

Petitioner's 6<sup>th</sup> and 14<sup>th</sup> Amendment Constitutional rights under due process clause and the equal protection of law were violated.

(2)

**WHETHER PETITIONER'S 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENT RIGHTS WERE VIOLATED UNDER STRICKLAND BY TRIAL COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO SUBPOENA THE TESTIMONY OF THE CASE ATTEMPTED MURDER VICTIM WHO POSSESSED AND FIRED [A]NOTHER .22 WEAPON DURING THE CASE SHOOTING; WHICH TESTIMONY BY STATE WITNESSES SUGGEST WAS THE .22 WEAPON THAT FIRED THE FATAL SHOT**

Trial counsel denied petitioner his 6<sup>th</sup> and 14<sup>th</sup> Amendment Constitutional rights when he failed subpoena the testimony of the attempted murder victim Emanuel miller, who disclosed he possessed, brandished and fired another .22 caliber type weapon during the time the deceased was fatally wounded. Petitioner suffered prejudiced in his defense as a result. This evidence was "excluded" and "precluded" from petitioner's trial. Miller was the armed protector of the deceased. See United States v. Piper, 912 F.3d 847 (5<sup>th</sup> Cir. Jan 10, 2019). When petitioner approached the deceased, Miller opened fired and both the deceased and petitioner fell to the ground to escape Miller's gun fire. Miller was then shot by petitioner co-defendant. During the trial proceedings, Miller never testified; thereby, depriving the jurors to know and evaluate Miller's testimony of possessing and firing another .22 type gun at the crime scene. Miller's testimony was exculpatory in nature and would have exonerated petitioner of having committed first degree felony murder. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. (1965). But for trial counsel's deficient performance, the outcome of the trial proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984).

(3)

**WHETHER PETITIONER'S 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENT WERE VIOLATED BY THE APPELLATE COURT, UNDER THE "INNOCENCE EXCEPTION TO THE PROCEDURAL DEFAULT" PETITIONER MADE A SUBSTANTIAL SHOWING TO PROCEED ON HIS "GATEWAY ACTUAL INNOCENCE" CLAIM SCHLUP WHERE AN "EYEWITNESS" AND "CRITICAL PHYSICAL EVIDENCE WAS NOT PRESENTED AT TRIAL"**

Petitioner's 6<sup>th</sup> and 14<sup>th</sup> Amendment Constitutional rights were violated by the appellate court where petitioner made a substantial showing under the "innocence exception to the

procedural default” to proceed on his “gateway actual innocence” claim. House v. Bell, 547 U.S. 518, 536-537 S.Ct. 2064, 2066-77 (2006). An “eyewitness” and “critical physical evidence” was not presented at trial. See Schlup v. Delo, 513 U.S. 298 at 328 (1995). “Actual innocence” means factual innocent, not mere legal insufficiency”. Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (citing Sawyer v. Whitley, 505 U.S. 333, 339, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)).

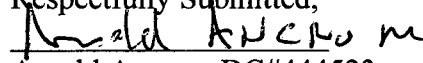
Victim/Eyewitness Emanuel Miller did not testify at petitioner’s trial. Testimonial evidence by state witnesses not only concluded another .22 type weapon, but determined petitioner spent .22 projectile submitted “did not conclusively” match to petitioner’s .22 weapon. Evidence of the .22 caliber type weapon that Miller possessed and fired during the case shooting was “excluded” and “precluded” from petitioner’s trial. @ Schlup. These two missing components had a “substantial” and “injurious” effect on petitioner being found guilty of first degree felony murder. See Brecht v. Abrahamson, 507 U.S. 619 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

In light of this “new reliable evidence” and “eyewitness”, no juror acting reasonably would find him guilty beyond a reasonable doubt of first degree felony murder. A constitutional violation has probably resulted in the conviction of one who is actually innocent. See Rozzelle v. Sec’y, F.D.O.C., 672 F.3d 1000 (2012), (Citing) Murry v. Carrier, 477 U.S. 478, 496 106 S.Ct. 2639, 2650 (1986).

### CONCLUSION

The petition of Writ of Certiorari was executed on this 28<sup>th</sup> day of December 2023 and should be granted

Respectfully Submitted,



Arnold Ancrum DC#444523

Okeechobee Correctional Insti.

3420 N.E. 168<sup>th</sup> street

Okeechobee, Florida 34972

Date: